

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

**ISSUES**

1. What is the nature and extent of claimant's injury?
2. What is the amount of compensation that is due and owing?
3. Is claimant entitled to continued medical care without the necessity of filing an application to the Director?
4. Did the ALJ err in improperly using portions of the fourth edition of the *AMA Guides*,<sup>1</sup> which were not included in the record, in determining claimant's permanent partial general disability?

At oral argument, the parties agreed that claimant would be entitled to a permanent partial general work disability under K.S.A. 44-510e for the period December 23, 2004, through March 7, 2005 (a period of 10.71 weeks), and for the period November 1, 2004, through December 23, 2004 (a period of 7.57 weeks). These work disability periods would be in addition to the periods during which claimant would be entitled to an award for claimant's functional impairment. As noted by the ALJ, and based upon claimant's stipulated average weekly wage of \$404.58, claimant would be paid permanent partial disability benefits during these periods at the rate of \$269.73 per week.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, a juvenile corrections officer for respondent, was injured on October 29, 1999, when, as she and other staff members struggled with a female inmate, claimant was kicked in the inside of her left knee. Claimant was referred for medical treatment, ultimately coming under the care of Michael J. Johnson, M.D., an orthopedic doctor in Salina, Kansas. Claimant was referred for conservative care, including physical therapy and pain management, but ultimately surgery was performed on December 8, 1999, consisting of an anterior cruciate ligament (ACL) reconstruction with patellotendon graft.

Several months later, claimant began experiencing back pain with radiculopathy into her left leg. Claimant was later referred to Alan Moskowitz, M.D., who performed surgery on claimant's low back on June 12, 2002, involving a two-level fusion from L4 to S1 with instrumentation and an anterior discectomy. In between medical treatments, claimant

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

returned to work with respondent at an accommodated position. Claimant continued working for respondent in an accommodated position until February 17, 2004, at which time she was laid off due to respondent's inability to accommodate her restrictions. At the time of the layoff, temporary total disability payments were resumed. Claimant obtained other employment with Bell Memorial Hospital in a secretarial/sales position on November 1, 2004. She continued working full time until December 23, 2004, at which time she resigned due to difficulties with her supervisor. Claimant was off work for several weeks, ultimately returning to her employment with respondent in an accommodated position at a comparable wage on March 7, 2005. At the time of the regular hearing, claimant continued working for respondent in that accommodated position.

At the request of her attorney, claimant was evaluated by Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. His examination and evaluation were performed on March 17, 2004. Dr. Murati ultimately became claimant's treating physician for the purpose of conservative care, including pain management. Dr. Murati assessed claimant a 25 percent impairment to the body as a whole, for the injuries suffered to her back, pursuant to the fourth edition of the *AMA Guides*,<sup>2</sup> finding that claimant qualified for a DRE Category V impairment. Dr. Murati testified that since claimant had undergone a fusion, by definition, the fusion was intended to treat an instability of the spine. This, coupled with the fact that Dr. Murati noted findings consistent with radiculopathy, qualified claimant for a Category V, 25 percent whole body impairment. He further assessed claimant an 8 percent impairment to the left lower extremity for atrophy of the left thigh and a 17 percent impairment to the left lower extremity for moderate laxity of the ACL ligament. All combined, this combined for a 32 percent whole person impairment pursuant the fourth edition of the *AMA Guides*.<sup>3</sup>

Dr. Murati reviewed a task list created by vocational specialist Jerry Hardin, finding that claimant was unable to perform sixteen of the thirty-two tasks on the list for a 50 percent task loss.

Claimant was referred by respondent to Philip R. Mills, M.D., board certified in physical medicine and rehabilitation, for an examination on January 26, 2005. Dr. Mills noted claimant had left knee post ACL reconstruction with patellotendon autograft; degenerative disc disease at L5-S1 with borderline hypermobility at L4-5; post anterior discectomy, anterior spinal fusion at L4-5 and L5-S1 and a posterior decompression; and posterior spinal fusion L4 through S1 with instrumentation. Dr. Mills assessed claimant a 15 percent impairment to the body as a whole for the injuries suffered, which included a 10 percent impairment to the body as a whole for claimant's low back problems pursuant

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<sup>2</sup> *AMA Guides* (4th ed.).

<sup>3</sup> *AMA Guides* (4th ed.).

to the AMA *Guides* Lumbosacral DRE Category III. He also assessed claimant a 3 percent impairment to the body as a whole for the left lower extremity impairment from the cruciate ligament reconstruction. Dr. Mills found claimant to suffer from mild laxity in the knee. He was unable to find any evidence of atrophy in claimant's left thigh. In reviewing the task list prepared by vocational expert Karen Terrill, Dr. Mills found, of the thirty-nine tasks on the list, claimant was unable to perform fifteen, for a 38 percent task loss.

As noted above, claimant was either working for respondent at a comparable wage or receiving temporary total disability benefits for the entire time through her return to work for respondent on March 7, 2005, with the exception of the periods November 1, 2004, through December 23, 2004, and December 23, 2004, through March 7, 2005. During those periods, the parties have agreed that claimant is entitled to a permanent partial general work disability under K.S.A. 44-510e. In that regard, the Board affirms the ALJ's award of 10.71 weeks permanent partial general disability compensation at the agreed rate of \$269.73 per week for the period December 23, 2004, through March 7, 2005. Additionally, claimant is awarded 7.57 weeks permanent partial general disability compensation at the rate of \$269.73 per week for the period November 1, 2004, through December 23, 2004.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

With regard to what, if any, functional impairment claimant may have suffered, the Board must consider the language of K.S.A. 44-510e, which states:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.<sup>5</sup>

This record contains two medical opinions regarding what, if any, functional impairment claimant may have suffered as a result of both the knee and back injuries suffered while employed with respondent. The opinion of Dr. Murati regarding claimant's back injuries conflicts with that of Dr. Mills in that Dr. Murati found claimant to have suffered a DRE Category V disability, while Dr. Mills assessed claimant a disability pursuant to the DRE Category III. The ALJ, in reviewing Dr. Murati's functional impairment, considered the AMA *Guides* and the requirements specified in the AMA *Guides* for defining loss of motion segment integrity and antero-posterior motion or slipping of one vertebra over another.

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<sup>4</sup> K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

<sup>5</sup> K.S.A. 44-510e(a).

This particular section of the *AMA Guides* was not identified by the parties nor was it made part of this record. Claimant objected, arguing that the ALJ went outside the record in citing this particular provision, contending that the ALJ's utilization of the *AMA Guides* in this fashion was inappropriate. In *McGrady*,<sup>6</sup> the Board found that an administrative law judge would be justified in utilizing the *AMA Guides* conversion chart in determining the combined percentages of impairment suffered by a claimant. The Board, in *McGrady*, determined that the use of the *AMA Guides* conversion chart did not add evidence to the record, but simply provided a method for combining multiple ratings or converting ratings already in the record to a general body rating.

In this instance, the ALJ went further than in *McGrady*. Here, the ALJ sought out additional sections of the *AMA Guides* in interpreting and actually criticizing the determination by a physician as to what, if any, functional impairment claimant may have suffered. The Kansas Court of Appeals, in *Durham*,<sup>7</sup> was asked to consider whether the claimant could cite the *AMA Guides* when those guidelines were never introduced into evidence and were not a part of the record on appeal. The claimant, in *Durham*, attached the Guidelines to his brief as an appendix. The Court, in *Durham*, ruled that:

An appellant has the burden to designate a record sufficient to establish the claimed error. Without an adequate record, an appellant's claim of alleged error fails.<sup>8</sup>

The Court went on to find that the assertions contained in the claimant's brief were not sufficient to satisfy the inadequacies in the record. As the record, in *Durham*, did not include the *AMA Guides*, the court determined that the record contained no support for the claimant's argument concerning the *AMA Guides*. The claimant's argument was, therefore, rejected. The fact-finder is always free to find an opinion more persuasive or credible than another. But the fact-finder should not go outside the record in doing so.

In this instance, as in *Durham*, the sections of the *AMA Guides* utilized by the ALJ were not made a part of this record. The Board, therefore, finds pursuant to the dicta contained in *Durham*, that the utilization by the ALJ of the sections of the *AMA Guides* which were not made a part of the record was inappropriate. Therefore, the criticism of Dr. Murati's functional impairment opinion by the ALJ is improper. Furthermore, neither the ALJ nor the Board have a medical degree or formal training in the use of the *AMA Guides*. It is unacceptable for the fact-finder to make use of the *Guides* in the manner utilized

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<sup>6</sup> *McGrady v. Delphi Automotive Systems*, No. 199,358, 1998 WL 229871 (Kan. WCAB April 6, 1998).

<sup>7</sup> *Durham v. Cessna Aircraft Co.*, 24 Kan. 334, 945 P.2d 8, rev. denied 263 Kan. 885 (1997).

<sup>8</sup> *Id.* at 334-335; citing *McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 (1994).

herein. Although the ALJ may use the *Guides* for the purpose of determining a combined value,<sup>9</sup> the fact-finder should rely on the opinion testimony of medical experts when it determines matters of diagnosis and treatment and the proper use of the *AMA Guides*. The Board, therefore, finds that the ALJ's rejection of Dr. Murati's functional impairment rating with regard to claimant's back injury was inappropriate and the ALJ's determination in that regard is reversed.

In considering both the opinion of Dr. Murati and the opinion of Dr. Mills, the Board finds both opinions to have some merit, as well as drawbacks. The Board, therefore, finds that claimant has suffered a 17.5 percent permanent partial impairment to the body as a whole for the injuries suffered to her low back.

With regard to the impairment assessed claimant's left leg, the Board finds the opinion of Dr. Murati, that claimant has an 8 percent impairment to the lower extremity as a result of atrophy, to be contradicted by this record. Dr. Murati assessed claimant that 8 percent impairment in March of 2004, when he examined her. When Dr. Mills examined claimant in January of 2005, he noted specifically that there was no atrophy present to claimant's left thigh. The Board, therefore, considers Dr. Mills' opinion to be more credible and finds claimant suffered no permanent impairment as a result of atrophy. Both doctors, however, found claimant to have suffered laxity to the ACL, with Dr. Murati finding the laxity to be at a moderate level and Dr. Mills finding the laxity to be at a mild level. In considering the functional impairment opinions of the two doctors, the Board finds that claimant has suffered a 9.8 percent permanent partial impairment to the body as a whole for the injuries suffered to her left lower extremity and a 17.5 percent whole body impairment for the injuries suffered to her lower back. In utilizing the combined values chart of the *AMA Guides*,<sup>10</sup> the Board finds claimant has a 25 percent impairment to the body as a whole on a functional basis pursuant to K.S.A. 44-510e. The Award of the ALJ is modified accordingly.

Claimant further requests that future medical be ordered, with respondent to designate an authorized treating physician for the purpose of conservative care and pain management. At oral argument, the parties acknowledged that Dr. Murati had been claimant's authorized treating physician for the purpose of pain management. However, respondent's attorney advised that claimant was being referred to Paul Stein, M.D., to determine claimant's need for ongoing medical care. At the time of oral argument, Dr. Stein's examination had not occurred and, therefore, there was no opinion from his office regarding claimant's ongoing medical care needs.

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<sup>9</sup> *McGrady, supra.*

<sup>10</sup> *AMA Guides* (4th ed.).

K.S.A. 44-510h makes it the duty of the employer to provide the services of a health care provider as may be reasonably necessary to cure and relieve the employee from the effects of any work-related injury. Respondent does not dispute the injuries suffered by claimant. Respondent questions claimant's need for ongoing pain management, thus the referral to Dr. Stein. The Board modifies the Award of the ALJ to find that respondent shall appoint a physician for the purpose of providing claimant conservative care, including pain management, to cure and relieve the effects of claimant's injuries. Should that physician conclude that claimant is no longer in need of ongoing conservative care or pain management care, then respondent may file a review and modification action under K.S.A. 44-528 and request that the ongoing conservative care and pain management be discontinued.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the November 23, 2005 Award of Administrative Law Judge Bruce E. Moore should be modified to award claimant a 25 percent permanent partial general disability on a functional basis for the injuries suffered on October 26, 1999, and a series through June 9, 2002.

Claimant is entitled to 78.14 weeks of temporary total disability compensation at the rate of \$269.73 per week totaling \$21,076.70, followed by 87.97 weeks of permanent partial general disability compensation on a functional basis at the rate of \$269.73 per week totaling \$23,728.15 for a 25 percent permanent partial general body disability on a functional basis, followed by 10.71 weeks of permanent partial general disability compensation at the rate of \$269.73 per week totaling \$2,888.81 for the period December 23, 2004, to March 7, 2005, followed thereafter by 7.57 weeks of permanent partial general disability compensation at the rate of \$269.73 per week totaling \$2,041.86 for the period November 1, 2004, to December 23, 2004, for a total of \$49,735.52, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Respondent is ordered to designate an authorized health care provider for the purpose of providing claimant conservative medical care and/or pain management, as is necessitated by claimant's injuries.

In all other regards, the Award of Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant  
E. L. Lee Kinch, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director